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Controversy: Robert John Araujo's *International Tribunals and Rules of Evidence*

Written by: Dorislee Jackson

Note: this piece is a critical essay on an article originally published by the American University International Law Review (Robert John Araujo, S.J., *International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the 'Priest-Penitent' Privilege Under International Law*, 15 Am. U. Int'l L. Rev. 639 (2000)).

Robert John Araujo's article is a response to discussions by the Preparatory Commission of the Diplomatic Conference of Plenipotentiaries for the Establishment of an International Criminal Court. The Commission's purpose is to generate Rules of Procedure and Evidence for the International Criminal Court. At least one of these rules will address confidential privileges. The author encourages that the priest-penitent privilege should be observed in the International Criminal Court. This conclusion is based on a discussion of the history and status of the privilege in criminal justice systems throughout the world.

Initially, the paper describes religious confession as an "ancient tradition in religious thought and practice." Id. at 643. The author quotes many biblical and religious sources in support of the preservation of the priest-penitent privilege. For example, the author copies the words of Theodore of Mopsuestia:

It behooves us, therefore, to draw near to the priests in great confidence and to reveal to them our sins; and those priests, with all diligence, solicitude, and love, and in accord with the regulations . . . will grant healing to sinners. [The priests] will not disclose the things that ought not be disclosed; rather, they will be silent about the things that have happened, as befits true and loving fathers who are bound to guard the shame of their children while striving to heal their bodies. Id. at 644. The author also notes the continued importance of secrecy of words spoken in confession. To this day, it is a violation of Canon Law for a priest to break his vows of secrecy and betray his penitent in any way. Violations result in automatic excommunication.

After the examination of the religious importance of confidentiality in the confessional, the author moves to a discussion of the priest-penitent privilege at common law in Europe, Canada, Australia, and New Zealand. In England, the author finds a strong history of the privilege. The author quotes, for instance, the following conclusion made by the Council of Durham in 1220:

A priest shall not reveal a confession - let non dare from anger or hatred or fear of the Church or of death, in any way to reveal confessions, by sign or word, general or special, as (for instance), by saying, 'I know what manner of men ye are,' under peril of this Order and Benefice, and if he shall be convicted thereof he shall be degraded without mercy. Id. at 650. The author concludes that the strong history of the priest-penitent privilege in England is, at least in part, a result of the "nexus between the laws of the land and the laws of the Church in [the] Christian country." Id. at 650. Further, the author notes that the priest-penitent privilege continued to be enforced by church law even after the formation of the Church of England.

The author recognizes that England did not have a statute preserving the priest-penitent privilege, but does find statutes of this sort in both Austria and Germany. See *id.* at 653 (citing Austrian Code of Criminal Procedure of 1873 and German Zivilprozessordnung, Section 383(1)). In France, the privilege is not explicitly codified, but was incorporated as a part of the Code Penal by the Supreme Court of Appeal in the case of *Lambel-Mayer*. The author notes that both Australia and New Zealand have statutes that preserve the privilege. Also, the Supreme Court of Canada has allowed that, in particular circumstances, testimony might be excluded because it is protected by the priest-penitent-privilege. The author next discusses the observation of the priest-penitent privilege in the United States. The Supreme Court has recognized the privilege on several occasions as has at least on Circuit Court of Appeals.

Finally, the author turns to the existence of the privilege under international law. He turns first to the Universal Declaration of Human rights, stating, "[i]t would be an incursion on [the] universal right of [freedom in] practice, and observance of religious beliefs that encourage confidential communications about wrongful acts, to require a part to such communication to divulge anything about the communication." *Id.* at 661. In 1996 the International Covenant on Civil and Political Rights codified that portion of the Universal Declaration that deals with religious freedom. A 1996 draft of the Transnational Rules of Civil Procedure and Accompanying Commentary preserves the priest-penitent privilege.

The author concludes his paper by recognizing that in order for the International Criminal Court to be successful it must be credible. Further, the author concludes that incorporation of the priest-penitent privilege into the rules of evidence for such court will assist in creating the credibility necessary for success. The author states that incorporation of the privilege serves to "acknowledge and respect a long-standing principle of criminal evidentiary procedure that exists in numerous legal systems." *Id.* at 665.